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IN THE

Supreme Court of The United States

October Term, 1945

No. 290 24

HALLIBURTON OIL WELL CEMENTING COMPANY, a Delaware corporation,

Petitioner,

vs.

CRANFORD P. WALKER and CRANFORD P. WALKER, D. A. WALKER, ROBERT P. MILLER and MILO C. KETCHUM, doing business as Depthograph Company, a copartnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

EARL BABCOCK,

Attorney for Petitioner.

MCCORMICK AND HENDERSON, INC., CHICAGO

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IN THE

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No. .....

HALLIBURTON OIL WELL CEMENTING COMPANY, a Delaware corporation,

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vs.

CRANFORD P. WALKER and CRANFORD P. WALKER, D. A. WALKER, ROBERT P. MILLER and MILO C. KETCHUM, doing business as Depthograph Company, a copartnership,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Halliburton Oil Well Cementing Company respectfully prays that a writ of certiorari issue to the United States Circuit Court of Appeals for the Ninth Circuit to review the decree of that Court holding valid and infringed United States Letters Patent 2,156,519, which decree was entered on December 28, 1944 (R. 1612). Petition for rehearing was denied on June 11, 1945 (R. 1613).

A certified transcript of the record in the case, including the proceedings in the Circuit Court of Appeals is furnished herewith in compliance with Rule 38 of the Rules of this Court.

Summary Statement of the Matter Involved.

This suit was brought by Respondents against Petitioner for infringement of three United States patents issued to Cranford P. Walker. Two of the patents, Nos. 2,209,944 and Reissue 21,383 were held invalid by the Circuit Court of Appeals. This petition seeks a review of the portion of the decree affirming the District Court and holding valid and infringed certain claims of the third patent, No. 2,156,519 granted May 2, 1939 for "Means for Measuring the Location of Obstructions in Wells." (A copy of this patent appears in Vol. III, Book of Exhibits, R. 587).

As to validity, the language of the claims raises a question of law. Patent 2,156,519 is concerned with the location of the level of fluid in a well, such as an oil well. The apparatus disclosed includes a cylinder of gas under pressure and a valve for creating a pressure wave in a well and a system for recording on a chart the time when the wave is initiated and the time when echoes return from obstructions in the well. Apparatus of this type is old in the prior art, as in the patent to Lehr et al. (R. 1101). The novelty of the patent in suit was found by the District Court to reside in the addition of an adjustable pipe which functions as an acoustical tuned resonator so that better records can be made of echoes from collars on tubing in the well. (Findings of Fact Nos. 4, 5, 6, R. 28, 29). The Circuit Court of Appeals also held (R. 1599, 1600) that the novelty in the patent resided in this element, which it referred to as a "device which would enable the operator to tune up certain desirable echoes while tuning out undesirable ones," (R. 1600). This element is described in Claim 1 (R. 596) as "means ... for tuning ... " Similar phrases are used in claims 13, 14, 15 and 17 in suit (R. 597, 598). Judge Denman held such phrases to be functional (R. 1615), but the Court held (R.

1600) that these claims complied with the statute. The decision of this Court in the case of *General Electric Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364, 82 L. Ed. 1402, condemning the use of functional language to define novelty in claims, was distinguished on the ground that there the claim was for a single element, whereas here combination claims are involved. (See *per curiam* decision of the Court of Appeals denying petition for rehearing, R. 1614).

As to infringement, certain proceedings in the Patent Office raise a question of law. The recording system disclosed in patent 2,156,519 is mechanical. There is no showing or disclosure in this patent of an electrical recording system of any kind, or of electrical tuning means. In a copending application for patent, Serial No. 164,534 (Exhibit L, R. 953), filed by Respondent Walker, a system similar to that of patent 2,156,519 is disclosed, except that an electrical recording system is used to record the echoes, and electrical tuning means is provided to cause the recording system to respond particularly to echoes from tubing collars. In this copending application, claim 15 (R. 982) on the tuned electrical system was rejected (R. 1002) as involving no invention over prior art and cancelled (R. 1003). The rejected claim 15 reads squarely upon the accused device manufactured and used by Petitioner.

Petitioner's device is similar to the system of the patent in suit except that it uses a gun instead of a pressure cylinder and an electrical recording system instead of a mechanical one. To the amplifier an electrical filter is connected which, it has been held, tunes the circuit. When the filter is used, the accused device has been held to infringe patent 2,156,519.

The Circuit Court of Appeals ignored the proceedings in the Patent Office, accorded great breadth to the claims in suit and enjoined Petitioner from using an electrical system which the Patent Office specifically held (R. 1002) involved no invention over the prior art.

Petitioner is practically the only competitor of Respondents in the business of furnishing owners or operators of oil wells with sonic depth measuring apparatus (R. 204, 205, 216). The Gulf Oil Company has made and used such a device on some of its own wells, but has not offered to perform any service for others. Petitioner and Respondents are the only concerns offering this service to the oil industry. For this reason, conflict between Circuit Courts of Appeals on the question of validity of patent 2,156,519 is improbable.

Questions Presented.

The decree of the Ninth Circuit Court of Appeals raises two questions of law:

Question 1. Is the doctrine of the case of *General Electric Co.* v. *Wabash Appliance Corp.*, 304 U. S. 364, 82 L. Ed. 1402, condemning the use of indefinite and functional language at the exact point of novelty in a claim of a patent, applicable to a claim on a combination of elements, or should the doctrine be limited, as held (R. 1614, 1616) by the Ninth Circuit Court of Appeals, to a claim on a "single element" or "specific product?"

Question 2. Is the doctrine of the case of *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 311 U. S. 211, 85 L. Ed. 132, precluding the giving of a claim of a patent such scope as will include within its terms subject matter rejected and cancelled while the application for patent was pending, applicable to a situation where an inventor files two applications on different species of his invention, the rejection and cancelation taking place in one and the claim in suit issuing in the other?

Reasons Relied Upon for the Allowance of the Writ of Certiorari.

The discretionary power of the Court is invoked upon the following grounds:

1. That the Circuit Court of Appeals for the Ninth Circuit, by Ruling That "Means . . . for Tuning . . . " in Claim 1 and Like Functional Statements in Claims 13, 14, 15 and 17 of Patent 2,156,519 Define the Only Novel Element in the Claims "With Sufficient Distinctness and Clarity to Comply With the Statute," (R. 1600) Has Rendered a Decision in Direct Conflict With the Decision of This Court in General Electric Co. v. Wabash Appliance Corp., 304 U. S. 364, 82 L. Ed. 1402.

2. That the Circuit Court of Appeals for the Ninth Circuit, by Ignoring the Rejection, Cancelation and Abandonment of a Claim in a Copending Application for Patent, Has so Construed the Claims in Suit as to Cause Them to Cover Subject Matter Refused Respondents by the Patent Office and Has Imposed Undue Restrictions on the Rules Governing the Construction of Claims Set Forth in Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211, 220, 221, 85 L. Ed. 132, 137, 138.

3. That Issues of Great Moment to the Public Are Involved; and Further Litigation of Patent 2,156,519 Which Might Result in Conflict Between Circuit Courts of Appeals Is Improbable Because Petitioner Is the Only Competitor of Respondents Offering the Services of Sonic Fluid Level Determining Apparatus to the Oil Industry.

For these reasons, it is respectfully submitted that this petition should be granted.

EARL BABCOCK,
Attorney for Petitioner.

STATE OF OKLAHOMA
COUNTY OF STEPHENS } ss.

EARL BABCOCK, being duly sworn, deposes and says:

That he is the attorney for the Petitioner herein, that he prepared the foregoing petition and that the allegations thereof are true, as he verily believes.

EARL BABCOCK,

Subscribed and sworn to before me this 30th day of July, 1945.

(Seal)

FAYE DALTON,
Notary Public.

My commission expires
August 14, 1947.

RIEF FOR PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

The Opinions of the Courts Below.

The opinion of the Circuit Court of Appeals for the inth Circuit is reported at 146 F (2d) 817, and is in the cord filed herewith (R. 1594). The opinion *per curiam*, d the concurring opinion of Judge Denman, denying the tition for rehearing appear in the record (R. 1614). The dings of fact and conclusions of law of the District Court pear in the record (R. 28-32.)

Jurisdiction.

The grounds for jurisdiction are:

1. The decree was entered December 28, 1944 (R. 1613). tition for rehearing on patent 2,156,519, upon which view is sought, was denied June 11, 1945 (R. 1613).

2. The decree was rendered in a suit in equity brought der the Patent Statutes to determine the issues of validity d infringement of letters patent issued by virtue of vised Statute No. 4886 (U. S. C., title 35, sec. 31).

3. The statute under which the jurisdiction of this urt is invoked is Sec. 240 (a) of the Judicial Code, 28 S. C. 347, as amended by the Act of February 13, 1925.

4. Cases believed to sustain the jurisdiction are:

United Carbon Co. v. *Binney & Smith Co.*, 317 U. S. 228, 87 L. Ed. 232;

Schriber-Schroth Co. v. *Cleveland Trust Co.*, 311 U. S. 211, 217, 85 L. Ed. 132, 135;

Mackay Radio & Telegraph Co. v. *Radio Corp. of America*, 306 U. S. 86, 89, 83 L. Ed. 506, 508;

Exhibit Supply Co. v. *Ace Patents Corp.*, 315 U. S. 126, 128, 86 L. Ed. 736, 740;

Muncie Gear Works v. *Outboard M. & Mfg. Co.*, 315 U. S. 759, 766, 86 L. Ed. 1171, 1177.

Statement.

The facts are sufficiently stated in the petition.

Statutes.

The statutes under which this case arises which are necessary to be considered are as follows:

R.S. Sec. 4886 (U. S. C., title 35, sec. 31). "Any person who has invented or discovered any new and useful art, machine, manufacture, or composition of matter, or any new and useful improvements thereof, ... not known or used by others in this country, before his invention or discovery thereof, and not patented or described in any printed publication in this or any foreign country, before his invention or discovery thereof or more than one year prior to his application, and not in public use or on sale in this country for more than one year prior to his application, unless the same is proved to have been abandoned, may, upon payment of the fees required by law, and other due proceeding had, obtain a patent therefor."

R.S. Sec. 4888 (U. S. C., title 35, sec. 33). "Before any inventor or discoverer shall receive a patent for his invention or discovery, he shall make application therefor, in writing, to the Commissioner of Patents, and shall file in the Patent Office a written description of the same, and of the manner and process of making, constructing, compounding, and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art or science to which it appertains, or with which it is most nearly connected, to make, construct, compound, and use the same; and in case of a machine, he shall explain the principle thereof, and the

best mode in which he has contemplated applying that principle, so as to distinguish it from other inventions; and he shall particularly point out and distinctly claim the part, improvement, or combination which he claims as his invention or discovery.... "

Specifications of Errors.

he errors which Petitioner will urge if the writ of cer-ari is allowed, are that the Circuit Court of Appeals for Ninth Circuit erred:

In affirming the decree of the District Court in hold-Walker patent 2,156,519 to be valid and infringed by tioner;

In failing to reverse the decree of the District Court olding the Walker patent 2,156,519 valid and infringed 'etitioner;

In holding Walker patent 2,156,519 to be valid;

In holding Walker patent 2,156,519 to have been in-ged by Petitioner;

In failing to hold that the law established by the deci-of this Court in *General Electric* v. *Wabash Appliance p.*, 304 U. S. 364, 82 L. Ed. 1402, was controlling and ositive of the litigation;

In failing to hold that the law established by the sion of this Court in *Schriber-Schroth Co.* v. *Cleveland st Co.*, 311 U. S. 211, 85 L. Ed. 132, was controlling and ositive of the litigation;

In holding that claims 1, 13, 14, 15 and 17 of Walker nt 2,156,519 define the alleged improvement thereof sufficient distinctness and clarity to comply with R. Sec. 4888 requiring a patentee to "particularly point and distinctly claim the part, improvement, or combina-which he claims as his invention or discovery;"

8. In holding that claims 1, 13, 14, 15 and 17 of Walker patent 2,156,519 cover the use of electrical apparatus not shown or described in the patent, after the Patent Office had refused to grant Walker a claim specific to such electrical apparatus in a copending application for patent.

Summary of Argument.

The points of the argument follow the reasons relied upon for the allowance of the writ of certiorari (p. 5, supra).

ARGUMENT.

1. That the Circuit Court of Appeals for the Ninth Circuit, by Ruling That "Means . . . for Tuning . . . " in Claim 1 and Like Functional Statements in Claims 13, 14, 15 and 17 of Patent 2,156,519 Define the Only Novel Element in the Claims "With Sufficient Distinctness and Clarity to Comply With the Statute," (R. 1600) Has Rendered a Decision in Direct Conflict With the Decision of This Court in General Electric Co. v. Wabash Appliance Corp., 304 U. S. 364, 82 L. Ed. 1402.

In the *General Electric* v. *Wabash* case, the patent involved had previously been held valid by the Circuit Court of Appeals for the Ninth Circuit. This Court, speaking through Mr. Justice Reed, said:

> "The claim uses indeterminate adjectives which describe the function of the grains to the exclusion of any structural definition, and thus falls within the condemnation of the doctrine that a patentee may not broaden his product claims by describing the product in terms of function. (Holland Furniture Co. v. Perkins Glue Co. 277 U. S. 245, 256-258, 72 L. Ed. 868, 872, 873, 48 S. Ct. 474, and cases cited). Claim 25 vividly illustrates the vice of a description in terms of function. 'As a description of the invention it is insufficient and if al-

lowed would extend the monopoly beyond the invention.' (277 U. S. at 258). The Court of Appeals for the Ninth Circuit relied on the fact that the description in the claims is not 'wholly' functional. 80 F. (2d) 958, 963. But the vice of a functional claim exists not only when a claim is 'wholly' functional, if that is ever true, but also when the inventor is painstaking when he recites what has already been seen, and then uses conveniently functional language at the exact point of novelty. (See Gynex Corp. v. Dilex Institute (C. C. A. 2d) 85 F. (2d) 103, 105; Davis Sewing Mach. Co. v. New Departure Co. (C. C. A. 6th) 217 F. 775, at 782)." 304 U. S. 364, 371, 82 L. Ed. 1402, 1406-1407.

n its decision denying the petition for rehearing in the e at bar (R. 1614) the Circuit Court of Appeals for the ith Circuit points out that in the *General Electric* v. *bash* case the claim considered was for a single element ereas the claims here are for a combination of elements. lge Denman states (R. 1615) that for this reason "the e seems of novel import." We submit that the interated limitation in the doctrine is not warranted.

n the *General Electric* case, in support of its condemna- of the use of conveniently functional language at the ct point of novelty, this Court cited two Circuit Court Appeals cases where claims to combinations of elements e under consideration. In *Gynex Corp.* v. *Dilex Institute Feminine Hygiene, Inc.*, 85 F. (2d) 103, C. C. A. 2, claim of the Beatty patent 1,870,942 covered a combination F. (2d) 105.) In *Davis Sewing Machine Co.* v. *New Deture Mfg. Co.*, 217 F. 775, C. C. A. 6, Judge Denison made extensive analysis of the law on the use of the words eans" and "mechanism" in combination claims. He ed:

"Reliance is also placed upon the opinion of this court, speaking by Judge (afterwards Mr. Justice) Lurton, in Tyden v. Ohio Table Co., 152 Fed. 183, 81

C. C. A. 425. In this case, the claim calling for 'means' was held invalid because it covered all means for accomplishing the result, and so was functional. We do not question the application of the rule as made to the facts of that case; but we do not understand that a claim is functional and invalid merely because one of its specified elements is 'means,' as in the Tyden Case, or 'mechanism', as in the present case. This result may or may not follow, depending upon whether the all-inclusive term is used with reference to the element or subcombination which is *the real point and gist of the invention,* or *whether it is used with reference to elements or parts of the combination already well known* and designed only to co-operate with the new element in order to make a completely operative unit. In other words, *where used with reference to the exact point of novelty,* 'means' or 'mechanism' *may expose the claim to attack* on the ground that it is functional; in that respect, each case will present a problem by itself. But where used with reference to the make-up of the field in which the real invention finds its usefulness or with reference to the connecting parts which permit the salient novelty of the invention to accomplish its function, these words are only a convenient formula of the broadest equivalency of which the real invention permits." (217 F. 775, 782-783) (Emphasis added).

In his opinion (R. 1614, 1615) on the denial of the petition for rehearing in the case at bar, Judge Denman lists three means (designating them B, C and D) of claim 1 of Walker patent 2,156,519. There can be no objection to the use of functional language in clauses B and C. These are directed to elements of the prior art, and under the doctrine of the *Davis Sewing Machine* case, it is proper to define those elements merely as "means". But clause D is directed to the real point and gist of the invention, and defines it only by the word "means" and its function. To hold that this is in compliance with R. S. Sec. 4888 is, we submit, in

irect conflict with the decision of this Court in the *General Electric* v. *Wabash* case. See also *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, 87 L. Ed. 232.

2. That the Circuit Court of Appeals for the Ninth Circuit, by Ignoring the Rejection, Cancelation and Abandonment of a Claim in a Copending Application for Patent, Has So Construed the Claims in Suit as to Cause Them to Cover Subject Matter Refused Respondents by the Patent Office, and Has Imposed Undue Restrictions on the Rules Governing the Construction of Claims Set Forth in Schriber-Schroth Co. v. Cleveland Trust Co., 311 U. S. 211, 220, 221, 85 L. Ed. 132, 137, 138.

The claims of a patent must be so construed as not to cover subject matter rejected by the Patent Office. Cancelled claims are regarded as disclaimers and create an estoppel which bars the patentee from asserting a monopoly on the subject matter dedicated to the public by the cancelled claims. *Schriber-Schroth Co.* v. *Cleveland Trust Co.*, 311 U. S. 211, 220, 221, 85 L. Ed. 132, 137, 138; see also *Exhibit Supply Co.* v. *Ace Patents Corp.*, 315 U. S. 126, 86 L. Ed. 736. In many other cases, this Court has applied the doctrine of file wrapper estoppel, but we have been able to find no case in which the facts are exactly the same as those in the case at bar.

Walker could have filed one application for patent covering the two systems he had conceived. Instead, he filed two applications, one on the mechanical system and one on the electrical. Had both ideas been presented in one application and those on the electrical system been rejected on the prior art and cancelled, the facts would be the same as in the above cited cases. No reason is apparent why the rules laid down by this Court as to the interpretation of claims do not apply to acts in copending applications.

"Where different applications by a patentee and interference proceedings relating to the same subject matter are pending at the same time, all may be considered in determining the construction of the patent as granted. . . .

"Where an inventor divides up his invention so as to present certain elements in different patents, he is thereby limited to a more strict and narrow construction than might have been otherwise necessary." 48 C. J. 218.

See also:

Tampax, Inc. v. *Personal Products Corp.*, 123 F. (2d) 722, 723 (C. C. A. 2), cert. den. 316 U. S. 665, 86 L. Ed. 1741;

Dodge Needle Co. v. *Jones*, 159 F. 715, 722 (C. C. A. 3);

Bestwall Mfg. Co. v. *U. S. Gypsum Co.*, 270 F. 542, 545, (C. C. A. 7);

North Am. Chem. Co. v. *Dexter*, 252 F. 148, 160, 161 (D. C., E. D. Wisc.);

Lewis Blind-Stitch Mach. Co. v. *Arbetter Felling Mach. Co.*, 208 F. 992, 1001 (D. C., N. D. Ill.), affirmed 219 F. 557, 560;

Electrical Accumulator Co. v. *Brush Elec. Co.*, 52 F. 130, 142 (C. C. A. 2).

While this defense was pleaded (Art. XVI of the Answer, R. 17), assigned as error (No. 6, R. 40) and presented to the Circuit Court of Appeals both in the main brief and in the petition for rehearing, no mention whatever is made of it by the Circuit Court of Appeals either in its Opinion or in its Denial of the petition for rehearing. We ask that this important question of law be decided by this Court, or the case remanded to the Circuit Court of Appeals for action thereon. *Cole* v. *Ralph*, 252 U. S. 286, 290, 64 L. Ed. 567, 574.

3. That Issues of Great Moment to the Public Are Involved; and Further Litigation of Patent 2,156,519 Which Might Result in Conflict Between Circuit Courts of Appeals Is Improbable Because Petitioner Is the Only Competitor of Respondents Offering the Services of Sonic Fluid Level Determining Apparatus to the Oil Industry.

Patent 2,156,519 having been held valid and infringed, rights of the public are involved in this litigation.

> "The possession and assertion of patent rights are 'issues of great moment to the public'." *Precision Instr. Mfg. Co.* v. *Automotive M. Mach. Co.*, ... U. S. ...., 89 L. Ed. ..... (Case No. 377, decided April 23, 1945).
>
> "To sustain claims so indefinite as not to give the notice required by the statute would be in direct contravention of the public interest which Congress therein (R. S. Sec. 4888, 35 U. S. C. A. sec. 33) recognized and sought to protect." *United Carbon Co.* v. *Binney & Smith Co.*, 317 U. S. 228, 233, 87 L. Ed. 232, 235.
>
> "To sustain the claims in question upon the established and admitted facts would require a plain disregard of the public interest sought to be safeguarded by the patent statutes, and so frequently present but so seldom adequately represented in patent litigation." *Muncie Gear Works* v. *Outboard M. & Mfg. Co.*, 315 U. S. 759, 768, 86 L. Ed. 1171, 1178.

Where the validity and infringement of a patent are in doubt and where it is improbable that conflict between Circuit Courts of Appeals will occur, due to the fact that only the litigants are engaged in competition thereon, certiorari may be granted. *Mackay Radio & Telegraph Co.* v. *Radio Corp. of America*, 306 U. S. 86, 89, 83 L. Ed. 506, 508.

Conclusion.

The decisions of this Court in the cases of *Ge*
Electric Co. v. *Wabash Appliance Co.*, 304 U. S. 36
Schriber-Schroth Co. v. *Cleveland Trust Co.*, 311 U. S
are concerned with doctrines of long standing on the
struction of claims in a patent. If these doctrines d
apply to certain types of claims or to certain proceed
in the Patent Office, the limitations thereon should b
plied uniformly. On the other hand, if the doctrine o
General Electric case applies to combination claims a
as to claims on a specific element, and if that of the *Sch*
Schroth case applies to all relevant proceedings i
Patent Office as well as to those in the application
contains the claim to be construed, rights of the publ
well as rights of Petitioner have been seriously imp
by the decision of the Circuit Court of Appeals fo
Ninth Circuit.

Therefore, your Petitioner respectfully submits tha
questions of law involved are of great importance
should be determined by this Court.

Respectfully submitted,

EARL BABCOCK,
Attorney for Petitione